Supreme Court, U.S.

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No. 06-____

IN THE

Supreme Court of the United States

NICHOLAS PAPPAS, ET AL.,

Petitioners,

v.

GREEK ORTHODOX ARCHDIOCESE OF NORTH AND SOUTH AMERICA,

Respondent.

Petition For A Writ Of Certiorari
To the Supreme Court of the State of New York,
Appellate Division, First Department

PETITION FOR CERTIORARI

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[May 14, 2007]

QUESTIONS PRESENTED

1. Whether the Religion Clause of the First Amendment bars a civil action that will require no judicial inquiry into an ecclesiastical issue of doctrine or canonical discipline (over which civil courts lack jurisdiction), but is instead narrowly confined to seeking declaratory relief about (a) the meaning of a provision in the constitution of a hierarchical church defining the procedure to be followed in the revision of its constitution, and (b) generally applicable state statutes articulating procedures to be followed by all religious communities that have voluntarily elected to become incorporated under state law.

2. Whether the nondiscrimination principle embedded in the Religion Clause prohibits disparate treatment of religious communities when a state court confers upon the leadership of a hierarchically governed religious community an immunity (a) from a breach of a contractual obligation to follow the process for amending a church constitution clearly specified in the text of the constitution, and (b) from noncompliance with generally applicable norms setting procedures to be followed by all religious communities that voluntarily elect to become incorporated under state law.

3. In *Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich*, 426 U.S. 696 (1976), the Court required mandatory deference to hierarchy in cases involving disputes within a hierarchical church over church doctrine or discipline. In *Jones v. Wolf*, 443 U.S. 595 (1979), the Court authorized civil courts to hear and decide secular aspects of intra-church disputes according to "neutral principles of law." In view of the substantial confusion in the

lower courts about how intra-church disputes over contract and property should be handled, should this Court now address the apparent tension between *Serbian Eastern Orthodox Diocese* and *Jones v. Wolf*?

STATEMENT REGARDING PARTIES

Petitioners, plaintiffs below, include the following members of the Greek Orthodox Archdiocese of North and South America: Nicholas Pappas, Plato Anton, Evan Alevizatos Chriss, James Counelis, John S. Gikas, Peter Haikalis, Anthony Kales, Joyce Kales, George Kappos, George Karcazes, Thomas Karras, Andrew Kartalis, Dino Kristakis, Kyriakos P. Marudas, Alex P. Mekedis, William Mitchell, Spiro J. Pappas, Vasileos Pavloglou, Eustace T. Pliakas, George Pontikes, John Skandalakis, Harry Spell, Katherine Valone, and Xenophon Zapis.

The following parties, originally named plaintiffs, are no longer parties to this action, either because they withdrew from the suit or have died: George Chimples, Constantine G. Chimples, Elaine Makris Daniels, Thomas Kyrus, Constantine Lacas, Harry Magafan, Peter D. Maniatis, George Souvall, and Efthalia Makris Walsh.

Respondent Greek Orthodox Archdiocese of North and South America, also known as the Greek Orthodox Archdiocese of America (the "Archdiocese") is a non-profit corporation organized and existing since 1921 under the laws of the State of New York. It has no stockholders or parent corporation or subsidiaries in the sense of a commercial corporation. Archbishop Demetrios Trakatellis was named as a defendant in the Complaint, but was dismissed as a party by the Trial Division of the Supreme Court of New York. App. 15a.

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Petition for Writ of Certiorari

Petitioners, who are members of the Greek Orthodox Archdiocese of North and South America, respectfully ask this Court to issue a writ of certiorari to review the judgment of the First Department of the Appellate Division of the Supreme Court of New York in this case.

Opinions Below

The order and opinion of the First Department of the Appellate Division of the Supreme Court of New York, is reported at 30 A.D.3d 286, 817 N.Y.S.2d 270 (2006) and is reprinted at App.1a-3a. The subsequent order of the New York Court of Appeals, dismissing an appeal "as of right," is reported at 7 N.Y.3d 863, 857 N.E.2d 1138, 824 N.Y.S.2d 607 (2006), and is reprinted at App.4a. The later order of the New York Court of Appeals, denying leave to appeal, is reported at 8 N.Y.3d 803, 862 N.E.2d 792, 830 N.Y.S.2d 700 (2007), and is reprinted at App.4a. The decision and order of the Trial Division of the Supreme Court of New York is unreported. App. 5a-15a.

Statement of Jurisdiction

The Trial Division of the New York Supreme Court dismissed this action as barred by the First Amendment to the U.S. Constitution. App.11a-14a. It later denied Petitioners' motion to renew, which argued that the court had failed to accept as true at the dismissal stage factual allegations in the verified complaint. Neither order of the trial court has been reported. Petitioners filed a timely motion to appeal, and the First Department of the Appellate Division of the Supreme Court of New York affirmed the decision to dismiss the case on First Amendment grounds. App. 3a-4a. Petitioners filed a timely notice of appeal "as of

right" with the Court of Appeals, which dismissed the appeal. App. 4a. Petitioners also filed a timely motion for leave to appeal with the same court, but the New York Court of Appeals declined discretionary review on February 13, 2007. App. 4a. This petition is filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

Constitutional and Statutory Provisions Involved

As applied to the States through the Fourteenth Amendment, the Religion Clause of the First Amendment provides: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof...." U.S. Const., Am. I.

Respondent is a hierarchically governed religious community that opted voluntarily to become incorporated as a religious corporation under New York Religious Corporation Law ("RCL") §15.1, (setting procedures for obtaining articles of incorporation). RCL §15.1 also sets generally applicable obligations of religious corporations such as frequency of meetings of the corporation and procedures to be followed when a religious community wishes to alter its corporate constitution or by-laws, and RCL §5 deals with adequate notice. *See also* New York Not-for-Profit Corporation Law, §102 (a)(2). The relevant parts of these statutes are reprinted in Appendix. App. 16a-20a.

Statement of the Case

Petitioners are loyal and faithful members of the respondent Greek Orthodox Archdiocese of North and South America ("Archdiocese"), which opted voluntarily to become incorporated under New York law in 1921.[1] Many petitioners

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[1] All facts set forth in the Statement are either uncontested or must be accepted as true and given the benefit of every possible favorable inference because the trial court resolved this case on a motion to dismiss. *See, e.g., Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

have served often in the Archdiocese's Clergy-Laity Congress ("CLC"). The regulations of the Archdiocese define the CLC as the "the highest legislative body of the Archdiocese." *Special Regulations and Uniform Parish Regulations* (1996), App. 20a. Article XI of the 1977 Charter or constitution of the Archdiocese describes this body as follows: "The Archdiocesan Clergy-Laity Congress is convened *biennially* and presided over by the Archbishop. It is concerned with all matters, *other than doctrinal and canonical*, which affect the life of the church including its unity, uniform administration, education and financial programs." App. 20a.[2]

This case involves *no ecclesiastical question of religious doctrine or canonical discipline.* On the contrary, the only relief now sought by petitioners is a declaration of their rights on two points: (1) whether the respondent has complied with provisions of state law that govern all other religious communities that have opted voluntarily – as the respondent did in 1921 – to incorporate as a religious corporation, and (2) whether recent proposed amendments to the respondent's charter comply with the contractual obligation undertaken by the Archdiocese and the Ecumenical Patriarchate when in 1977 they voluntarily adopted the following procedure for amending the corporate Charter or constitution: "The charter herein may be revised upon the request of the Archdiocesan Clergy-Laity Congress as the need therefor arises. Revisions thereto shall be submitted to the Ecumenical Patriarchate for approval and ratification." 1977 Charter, Art. XXIV. App. 20a.

A joint committee of the Patriarchate and the Archdiocese drafted a revision of the 1977 charter ("Proposed

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[2] The provision of the 1977 Charter that calls for biennial meetings of the CLC complies with a requirement of state law that meetings of religious corporations shall be held either "annually or biennially." RCL, §15.1. App.17a. Under a provision of the Purported 2003 Charter, the CLC is required to meet only *once only every three years*. Petitioners challenge this provision as inconsistent with RCL, §15.1.

Patriarchal Charter"). Without giving any advance notice of this Proposed Patriarchal Charter to the delegates of the 35th CLC in 2000, *see* RCL §5, App. 16a, the Archdiocese presented the document to the 36th CLC on July 2-3, 2002, under a "statement of procedure" that noted: "A motion to reject any article or the Proposed Charter as a whole will be ruled out of order by the Chair." An overwhelming majority of delegates of the 36th CLC expressed major concerns which were reflected in more than twenty recommendations or amendments, including one "for the continuation of the time-honored laity and clergy involvement in the administration of our church." The delegates of the 36th Congress adopted a resolution requesting the Patriarchate to revise the Proposed Patriarchal Charter by "such modifications as reflect the major concerns expressed by the Archdiocesan Council, the parishes, and by this Clergy-Laity Congress...."

On January 18, 2003, the Ecumenical Patriarch sent a letter to Archbishop Demetrios along with the text of a charter ("Purported 2003 Charter"), which is described as "approved by our Modesty and our Holy and Sacred Synod, and by whose regulations the Archdiocese of America will be henceforth governed." The Purported 2003 Charter does not contain any major changes requested by the 36th Congress, including "the continuation of the time-honored laity and clergy involvement in the administration of our church."

1. *The litigation in the trial court.* These facts gave rise to litigation over the two inter-related points stated above: conformity to New York law governing all religious corporations, and adherence to the Archdiocese's contractual obligation concerning the process for amending the Charter.

A. *Conformity to state law.* Pursuant to RCL §15 the corporation or Archdiocese adopted a Constitution in 1922, and amended it in 1927, 1931, and 1977. In each instance the process of amendment included the approval of the Charter by both the CLC and the Ecumenical Patriarchate of Constantinople ("Patriarchate"). RCL §5 specifies "the process that is due" from religious corporations (e.g., written

notice embodying the proposed revisions of by-laws at the previous meeting of the body). App. 16a. Petitioners contended that the Archdiocese did not give adequate "written notice, embodying ... proposed ... amendment" to the Charter of 1977 at any meeting of the CLC prior to 2002.

B. *Adherence to promise about amendment process.* RCL, §15(1) states that religious communities may amend their Constitutions only "in such manner as the corporation will determine." App. 17a. Petitioners contend that in Article XXIV of the 1977 Charter the Archdiocese *did* determine and specify the prescribed manner for amending its constitution, and that the Archdiocese breached its promise by refusing to allow the CLC the role assigned to it by the Charter.

Petitioners seek declaratory relief on purely procedural aspects of the life of the church, under generally applicable norms that govern all other religious and not-for-profit organizations and under specific contractual terms mutually agreed upon by the Archdiocese and the Patriarchate in 1977. They challenge no doctrine and are not part of any disciplinary dispute. Yet the lower court dismissed the suit on the ground that the First Amendment bars such relief, primarily because the respondent is a hierarchical church.

2. *The decision of the appellate court.* In affirming the dismissal of petitioners' suit on First Amendment grounds, the intermediate appellate court offered this explanation:

> Although plaintiffs have standing, and although the action is not moot and does not merely seek an advisory opinion, it must be dismissed because it involves a question of internal governance of a hierarchical church (*see Serbian E. Orthodox Diocese v. Milivojevich,* 426 U.S. 696 [1976]; *and see Maryland & Virginia Eldership of the Churches of God v. Church of God at Sharpsburg,* 396 U.S. 367, 369, n. 1, [1970] [Brennan, J., concurring], categorizing church government as either "hierarchical" or "congregational"; *accord Presbyterian Church v.*

> *United Presbyterian Church*, 62 N.Y.2d 110, 114, [1984], *cert. denied*, 469 U.S. 1037, [1984]). On the basis of the very charter on which plaintiffs rely, they cannot successfully dispute that the Greek Orthodox Church is hierarchical. And while it may at first appear that neutral principles of law can be applied to decide whether defendant's 1977 charter was properly amended pursuant to article XXIV thereof, if this case were to proceed further, a trial court would ultimately be required to decide whether the Ecumenical Patriarch had authority unilaterally to grant a charter to defendant in 2003 – clearly, a religious matter (*see First Presbyterian Church*, 62 N.Y.2d at 117). App. 3a.

We discuss below the constitutional errors in this cursory opinion. Petitioners, moreover, fully briefed the courts below on the importance of nondiscrimination on the basis of religion as a central value in this Court's Religion Clause jurisprudence. *See, e.g.*, *Employment Div. of Oregon v. Smith*, 494 U.S. 872 (1990) and *Agostini v. Felton*, 521 U.S. 203, 231 (1997). The lower court did not discuss any of the precedents we cited, and did not even discuss the one case it cited, *Locke v. Davey*, 540 U.S. 712 (2004), which is not remotely close to the facts or issues of this case. The full text of the lower court's discussion of this argument is as follows:

> Plaintiffs contend that since the courts would intervene if members of a nonreligious not-for-profit corporation claimed that the corporation's charter had not been properly amended, a decision not to intervene in the instant dispute would improperly discriminate against religion. While plaintiffs may raise this issue of law for the first time on appeal (*see Carnegie Hall Corp. v. City Univ. of New York*, 286 A.D.2d 214, 215, 729 N.Y.S.2d 93 [2001]), their argument is

unavailing (*see Locke v. Davey*, 540 U.S. 712 [2004]). App.3a-4a.

This case affords the Court an opportunity to reinforce the value of nondiscrimination in the setting of a church autonomy case, by emphasizing that civil courts have no jurisdiction over the religious *doctrines* or canonical *discipline* of any religious community – Jewish, Christian, Muslim, Hindu, Buddhist, or other. As the Court noted in *Jones v. Wolf*, 433 U.S. 595, 603-604 (1979), civil courts may only attempt judicial resolution of *secular* aspects of intra-church disputes that are within the ken and competence of judges: contractual obligations (such as those implicated in this case) and property disputes (such as those involved in scores of cases with which the lower court is in direct conflict). See Reasons for Granting the Petition, part 2 below.

Reasons for Granting the Petition

1. Introduction.

As noted in the Statement, the narrow focus of this case is not on any ecclesiastical issue of *doctrine* or canonical *discipline* (*see, e.g., Kliebenstein v. Iowa Conference of the United Methodist Church*, 663 N.W.2d 404 (Iowa), *cert. denied*, 540 U.S. 977 (2003)). Nor does the central issue in this case have anything to do with the hierarchical character of the Greek Orthodox Church, a red herring that the Archdiocese has, thus far successfully, urged throughout this litigation. See section 4 below. On the contrary, one of the inescapable questions presented in this case is whether *any religious body – no matter how it is governed* – has a *constitutional immunity from its contractual obligations* and a similar *immunity from generally applicable procedural norms* governing all religious communities that opt voluntarily to become incorporated as religious corporations under state law. As recent litigation relating to sexual abuse of minors by clergy sadly illustrates, civil courts must occasionally retain jurisdiction over some tort claims arising within a religious

community. *See, e.g.*, *Malicki v. Doe*, 814 So. 2d 347 (Fla. 2002). This fact alone cautions against a judicially imposed mandate of charitable immunity.

Moreover, the undisputed fact that *the Clergy-Laity Congress lacks jurisdiction over any doctrinal or canonical dispute*, *see* 1977 Charter, Article XI, App. 20a, should have made this case much easier to resolve than the Court's earlier cases involving intra-church disputes. For example, in *Watson v. Jones*, 80 U.S. (13 Wallace) 679 (1872), excommunicated members of a church refused to accept a binding ruling of the church on the application of the gospel to the issue of slavery. Unlike the dissidents in *Watson*, petitioners accept all the teachings of the church and make no attempt to seize or control any property of the church. Unlike *Order of St. Benedict v. Steinhauser*, 234 U.S. 640 (1914), this case presents no dispute over a question of an ecclesiastical requirement such as monastic discipline, but presents a question of enforcing voluntarily undertaken contractual obligations and the duty of compliance with statutory obligations of religious corporations. Unlike *Gonzalez v. Archbishop of Manila*, 280 U.S. 1 (1929), this case does not implicate the Court in the interpretation of religious doctrine such as the decision of a Catholic bishop concerning the appointment of a member of the clergy to celebrate the Mass. Unlike the Russian Orthodox who sought to oust the clergy in communion with the Patriarch of Moscow, *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952), and *Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190 (1960), petitioners do not seek to eject any of our leaders from a place of religious worship, either with the impermissible aid of a legislative enactment defining religious leadership or with an equally reprehensible judicial decision to the same effect. Unlike the dissidents in the local congregation in *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969), petitioners do not seek an unconstitutional determination by a civil court that church leaders had "departed from doctrine." Unlike *Serbian*

Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich, 426 U.S. 696 (1976), this case does not require a state court to undertake any inquiry into religious law in order to determine the validity of a canonical decision by a church tribunal to divest a bishop of his episcopal and monastic rank because of his "open defiance and rebellion against the church hierarchy."

Nevertheless, the New York courts have dismissed this lawsuit as barred on First Amendment grounds, even though, at bottom, this is nothing more than a dispute over the interpretation of a provision in the constitution of a religious corporation, adopted under RCL 15 §1, that specifies the procedure for revision or amendment of the charter. Since corporate constitutions and by-laws are contracts under New York law, this dispute can and must be resolved by the application of the same principles of contract law that govern the construction of any contract whose terms may require clarification.[3] Thus this action does not entangle the civil courts improperly in religious or theological matters beyond the competence or jurisdiction of the courts in a manner that would violate the First Amendment Religion Clause.

In section 2 we offer a few samples of dozens of cases that are in conflict with the decision below, which cannot be

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[3] Prohibition of unilateral alteration of a contract by one party without the approval of the other is implied in nearly all contracts, unless overridden by an express reservation by one or another of the contracting parties. On its face, Article XXIV of the 1977 Charter of the Archdiocese prohibits unilateral alteration of the Charter by the Ecumenical Patriarchate. Under New York law the organic documents of corporations have long been regarded as contracts. *Farmers' Loan & Trust Co. v. Aberle*, 18 Misc. 257, 262 (Sup. Ct. N.Y. County 1896), *modified*, 19 A.D. 79 (1st Dep't 1897). And New York courts expressly hold that a corporation's charter, by-laws, and rules are determinative of the procedural rights of its members. *See, e.g., Anderson v. Bd. of Dir. of Powelton Club*, 183 Misc. 2d 200, 702 N.Y.S. 2d 762 (1999). Thus in approving the Charter of 1977, both the Archdiocese and the Patriarchate voluntarily agreed to be bound by the mutual obligations expressed in Article XXIV.

reconciled with the frequent practice – explicitly authorized by this Court in *Jones v. Wolf*, 443 U.S. 595, 603 (1979) – of *construing constitutions and by-laws of religious corporations*, whether governed congregationally or hierarchically, to resolve secular issues of contract and property arising in intra-church disputes.

In section 3 we show that after *Jones v. Wolf*, 443 U.S. 595 (1979), the lower courts have produced glaringly inconsistent results, even with respect to the same religious community under virtually identical facts. The very fact that this case need not entangle courts in religious doctrine or discipline means that this case is an excellent vehicle for bringing much-needed clarification to this Court's teaching in *Jones v. Wolf*. *See* William G. Ross, "The Need for An Exclusive and Uniform Application of 'Neutral Principles' on the Adjudication of Church Property Disputes," 32 St. Louis U.L.J. 263, 265 (1987) ("inconsistency and unpredictability abound").

In section 4 we urge that the disarray noted above is due to two recurrent errors: (1) intrusion of judges into religious matters beyond their ken, competence and jurisdiction, and (2) improper abstention from exercising jurisdiction over (a) purely secular dimensions of a contract dispute involving no ecclesiastical question and (b) compliance with statutory procedures required of other religious and not-for-profit corporations. The lower court committed both errors; each is enough to grant the petition.

2. The decision of the lower court is in direct and irreconcilable conflict with decisions of other state appellate courts that have ruled that it is constitutionally permissible for civil courts to resolve a contract or property dispute by interpreting organic documents (charters, constitutions, and by-laws) of religious corporations, whether congregational or hierarchical.

Our review of state cases on intra-church disputes in this Court's decision in *Jones v. Wolf*, 433 U.S. 595 (1979),

discloses that the court below in ruling that a declaration of the meaning of Article XXIV of the 1977 Charter would violate the First Amendment, is in direct conflict with the cases cited in footnote 4 (grouped by jurisdiction), all of which ruled that inspection of church charters or constitutions and by-laws is not only permissible but often mandatory.[4]

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[4] AL: *Trinity Presbyterian Church v. Tankersley*, 374 So.2d 861 (Ala. 1979), *cert. denied* 445 U.S. 904 (1980); AR: *Arkansas Presbytery of the Cumberland Presbyterian Church v. Hudson*, 344 Ark. 332, 40 S.W.3d 301, *cert. denied*, 534 U.S. 945 (2001); CA: *Presbytery of Riverside v. Community Church of Palm Springs*, 89 Cal.App.3d 910, 152 Cal.Rptr. 854, *cert. denied*, 444 U.S. 974 (1979); *Protestant Episcopal Church v. Barker*, 115 Cal. App. 3d 599, 171 Cal. Rptr. 541 (1981), *cert. denied*, 454 U.S. 864 (1981); *Korean United Presbyterian Church of Los Angeles v. Presbytery of the Pacific*, 230 Cal. App. 3d 480, 281 Cal. Rptr. 396, *cert. denied*, 502 U.S. 1073 (1991); *California-Nevada Annual Conference of the United Methodist Church v. St. Luke's United Methodist Church* 121 Cal.App.4th 754, 17 Cal.Rptr.3d 442 (2004); CO: *Bishop and Diocese of Colorado v. Mote*, 716 P. 2d 85 (Colo. 1986); CT: *Rector, Wardens, and Vestrymen v. Episcopal Church*, 224 Conn. 797, 620 A. 2d 1280 (1983); DL: *East Lake Methodist Episcopal Church, Inc. v. Trustees of the Peninsula-Delaware Annual Conference of the United Methodist Church, Inc.*, 731 A.2d 798 (Del. 1999), *cert. denied*, 528 U.S. 1138 (2000); GA: *Crumbley v. Solomon*, 243 Ga. 343, 254 S.E.2d 330 (1979); *Jones v. Wolf*, 241 Ga. 388, 260 S.E.2d 84 (1979), *cert. denied*, 444 U.S. 1080 (1980); *Reddick v. Jones*, 251 Ga. 195, 304 S.E.2d 389 (1983); *First Born Church of The Living God, Inc. v. Bank South, N.A.*, 221 Ga. App. 739, 472 S.E.2d 469 (1996); *Srisovana v. Cambodian Buddhist Soc., Inc.*, 269 Ga.App. 600, 604 S.E.2d 637, (Ga.App. 2004); IL; *York v. First Presbyterian Church*, 130 Ill. App.3d 611, 474 N.E. 2d 716 (1984), *cert. denied*, 474 U.S. 865 (1985); *Grace Evangelical Lutheran Church v. Lutheran Church-Missouri Synod*, 118 Ill. App. 3d 151, 454 N.E.2d 1038 (1983), *cert. denied*, 469 U.S. 820 (1984); KY: *Bjorkman v. Protestant Episcopal Church in the United States of America*, 759 S.W. 2d 583 (Ky. 1988); LA: *Chimney Ville Missionary Baptist Church of Garland v. Rev. Luke Johnson*, 665 So. 2d 730 (La. App. 1995); *Mount Gideon Baptist Church, Inc. v. Gerard A. Robinson.*, 812 So. 2d 758 (La. App. 2002); MD: *Babcock Memorial v. Presbytery of Baltimore*, 464 A. 2d 1008 (Md. 1983); MI: *Bennison v. Sharp*, 121 Mich.App. 705, 329 N.W. 2d 466 (1983); *Calvary Presbyterian Church v. Presbytery of Lake Huron*, 148 Mich. App.105, 384 N.W. 2d 92 (1986); MN: *Basich v. Board of Pensions, Evangelical Lutheran Church*, 540 N.W.2d 82 (Minn. Ct. App. 1995), *cert. denied*,

For example, in *First Born Church of The Living God, Inc. v. Bank South, N.A.*, 221 Ga. App. 739, 472 S.E.2d 469 (1996), the Georgia Court of Appeals ruled that it was permissible for a civil court to inspect the *constitution* of a religious corporation to determine the party in an intra-church dispute who had control of bank assets. The Georgia court was aware of its obligation under the First Amendment to avoid "impermissible intrusion or excessive entanglement into ecclesiastical matters." 472 S.E.2d 469, 470. The Georgia court took the view that determining control of bank assets "is not of a religious nature but is secular," and that reading or construing a procedural aspect of a church constitution did "not call for the resolution of any ecclesiastical or theological dispute." *Id.* Hence the Georgia court ruled that it was permissible to decide the secular issue by determining whether the church's executive Board "duly complied with the provisions of the written *Constitution*." *Id.*

Similarly, the Georgia Supreme Court ruled in *Reddick v. Jones*, 251 Ga. 195, 304 S.E.2d 389 (1983), that civil courts may resolve intra-church disputes by "application

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519 U.S. 810 (1996); *Singleton v. Christ the Servant Evangelical Lutheran Church*, 541 N.W.2d 606 (Minn. Ct. App.), *cert. denied*, 519 U.S. 870 (1996); *Shepherd of the Valley Lutheran Church v. Hope Lutheran Church*, 626 N.W.2d 436 (Minn. Ct. App. 2001), *cert. denied*, 534 U.S. 1082 (2002); MS: *Shirley v. Christian Episcopal Methodist Church*, 748 So. 2d 672 (Miss. 1999), *cert. denied*, 531 U.S. 821 (2000); MO: *Presbytery of Elijah Parish Lovejoy v. Jaeggi*, 682 S.W. 2d 465 (Mo. 1984); NV: *Tea v. Protestant Episcopal Church*, 96 Nev. 399, 610 P. 2d 182 (1980); NJ: *Protestant Episcopal Church v. Graves*, 83 N.J. 572, 417 A.2d 19, *cert. denied*, 449 U.S. 1131 (1981); PA: *Presbytery of Beaver-Butler of United Presbyterian Church v. Middlesex Presbyterian Church*, 507 Pa. 255, 489 A.2d 1317, *cert. denied*, 474 U.S. 887 (1985). The court below in this case is even at odds with two decisions of the highest court of its own state; *see First Presbyterian Church of Schenectady v. United Presbyterian Church in the United States*, 62 N.Y.2d 110, 464 N.E.2d 454 (1984) (church constitution may be scrutinized to resolve a *property* dispute), and *Avitzur v. Avitzur*, 58 N.Y.2d 108 (1983) (religious marriage *contract* may be scrutinized to enforce a promise contained in the contract).

of neutral principles of law such as *state statutes*, *corporate charters*, relevant deeds, and the organizational *constitutions* of denominations" 251 Ga. at 196, (emphasis added) is clearly permissible under the leading Georgia case, *Jones v. Wolf,* 244 Ga. 388, 390, 260 S.E.2d 84 (1979), cert. denied, 444 U.S. 1080 (1980) (citing *Crumbley v. Solomon*, 243 Ga. 343, 254 S.E.2d 330 (1979); see also *Srisovana v. Cambodian Buddhist Soc., Inc.*, 269 Ga.App. 600, 604 S.E.2d 637, (Ga.App. Sep 15, 2004); *Mount Gideon Baptist Church, Inc. v. Gerard A. Robinson.*, 812 So. 2d 758 (La. App. 2002); *Chimney Ville Missionary Baptist Church of Garland v. Rev. Luke Johnson*, 665 So. 2d 730 (La. App. 1995).

Moreover, the permissibility of inspecting organic documents of a religious corporation is not limited to congregational churches. *See, e.g., Metropolitan Philip v. Steiger*, 82 Cal.App.4th 923, 931, 98 Cal.Rptr.2d 605 (2000) (provisions in the "*constitution* of the general church" can override any right the majority of a local congregation might otherwise have to control local church property); *Protestant Episcopal Church v. Barker*, 115 Cal. App. 3d 599, 171 Cal. Rptr. 541 (1981), *cert. denied*, 454 U.S. 864 (1981). The direct conflict between the lower court and so many other state tribunals suffices as a sound reason to grant this petition.

3. The cumulative effect of nearly three decades of inattention by this Court to church autonomy issues is that state appellate courts that normally handle disputes over contract and property are now sharply divided over judicial resolution of intra-church disputes.

In this section we discuss the effect of the glaring conflict among state courts on four prominent mainline Protestant denominations – Presbyterians, Episcopalians, Lutherans, and Methodists – to illustrate that the lower courts are in such confusion over what to do when a local congregation leaves the national body, that the same denomination is treated differently depending on the location of a local parish in one state or another.

"Church autonomy" is a term of art commonly used to embrace two important values discussed in section 4 below: that people of all faiths and of none deserve equal enjoyment of their civil rights of contract, tort, and property, and that civil courts have no jurisdiction over religious aspects – doctrinal or disciplinary – of disputes arising within a religious community, no matter whether that community is governed hierarchically or congregationally.

Members of the Court have occasionally referred to this body of law with approval while focusing on other aspects of First Amendment jurisprudence. For example, Justice Brennan invoked the doctrine of church autonomy to explain his views on the permissibility of religious preference in hiring by religious corporations: "Religious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to "select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions." *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 341-342 (1987) (quoting Laycock, "Towards a General Theory of the Religion Clause: The Case of Church Labor Relations and the Right to Church Autonomy," 81 Colum. L. Rev. 1373, 1382 (1981)).[5] And in an unemployment compensation case Justice Scalia expressly noted that "the government may not ... lend its power to one or the other side in controversies over religious authority or dogma." *Employment Div. of Oregon v. Smith*, 494 U.S. 872, 877 (1990) (citing *Blue Hull, supra*, *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952) and *Milivojevich*, *supra*).

In *Jones v. Wolf*, 443 U.S. 595 (1979), this Court ruled that states were free to apply "neutral principles of law" to disputes arising within a religious community. The hope expressed by the Court at the time was that "The neutral

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[5] This case does not present any opportunity to diminish any of the four freedoms of religious organizations to "select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions."

principles approach ... obviates entirely the need for an analysis or examination of ecclesiastical polity or doctrine in settling property disputes." *Id.* at 605.

For nearly three decades, however, this Court has declined to undertake plenary review of any case directly presenting an issue of church autonomy. The reality twenty-eight years after *Jones v. Wolf* is that state courts have generated utter incoherence with respect to the property rights of the same religious community. From the welter of confusion in state courts over how to resolve intra-church contract and property disputes, we have selected only a representative sample of incoherent rulings with respect to two *hierarchically governed* communities, Presbyterians and Episcopalians, and we refer to cases involving churches with hybrid polity. Before discussing these cases, we underscore that the lower court in this case is in direct and irreconcilable conflict with all of the cases in this section that took the Court's hint in *Jones v. Wolf*.

A. Presbyterian cases. Before *Jones v. Wolf*, Presbyterians used to be able to rely on the precedents of this Court, notably *Watson*[6] and *Blue Hull*,[7] that state courts handling

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[6] *Watson* involved a dispute over whether the slave-holding faction or the abolitionist faction of the Walnut Street Presbyterian Church of Louisville, Kentucky was entitled to ownership of the church. The Court ruled that in the case of a hierarchical church such as the Presbyterians, civil courts should defer to the definitive rulings of the leadership on matters of *doctrine* or *discipline*. But two other overlooked dimensions of *Watson* deserve attention. First, the Court did not make mistaken theological pronouncements on the term "hierarchical," but acknowledged that this term embraces many different forms of church polity or governance, and differing ways of defining the functions played by the clergy and the laity within these communities. Civil courts do not have a roving mandate to diminish these roles by judicial fiat. Second, the deference due to hierarchy on *doctrinal* or *canonical* disputes is equally due to congregational communities, for civil courts have no competence or jurisdiction to pronounce on the *theological* claims of contending parties in any religious community. The mere fact that Jews, Baptists, and Muslims are governed congregationally does not mean

disputes among Presbyterians would defer to the hierarchical structure of their church: *elders* gathered in a *presbytery*, which is connected to a *synod*, which is governed by an annual assembly.[8] After *Jones v. Wolf* it is anyone's guess how the issue of ownership of local church property will be determined when members disaffiliate from the church.

Thus a "large and influential body," *Watson*, 80 U.S. at 729, can no longer rely on the application of Court's precedents for an even-handed understanding of its polity by state courts. For example, in *Presbytery of Beaver-Butler of United Presbyterian Church v. Middlesex Presbyterian Church*, 507 Pa. 255, 489 A.2d 1317, *cert. denied*, 474 U.S. 887 (1985), the Pennsylvania Supreme Court ruled that "disputes as to meaning of agreements on wills, trusts, *contracts*, and property ownership ... are questions of civil law and are not predicated on any religious doctrine" and

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that civil courts may police the line between Orthodox and Reform Jews, American Baptists and Southern Baptists, or Sunni and Shi'a Muslims.

[7] In *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969), this Court clarified that intra-church property disputes may not turn on whether a general church "abandoned or departed from the tenets of faith and practice it held at the time the local churches affiliated with it." *Id.* at 441. Congregationally governed communities, such as Jews, Baptists, or Muslims, do not have a relationship to a body that is "higher" than the local community, but the underlying principle that civil courts do not police "departures from doctrine" is equally applicable to congregationally governed communities.

[8] Presbyterians regard the presbyterial or synodical structure of church governance as a teaching that is divinely mandated. *See John Calvin: Institutes of Christian Religion* 1053-84 (McNeil ed. 1960). But that does not mean that civil courts have any business evaluating theological claims of this sort. In any event, there is no dispute over *doctrine* or *discipline* in this case. As *Watson* itself teaches, deference to hierarchy does not extinguish the civil rights of members of churches to evenhanded adjudication of their civil claims in contract, tort, and property. *See Watson*, 80 U.S. 679, 731 (1872).

hence the question of what the parties agreed to, or whether they agreed at all, are "not doctrinal and can be solved without intruding into the sacred precincts" of "ecclesiastical questions." *Id.*, 507 Pa. at 262. As to such questions, the court adopted the nondiscrimination principle, expressly holding what the lower court in *Pappas* rejected, that courts should "apply the same principles of law as would apply to nonreligious associations." *Id.* When the Pennsylvania Court inspected the deed, it found no express trust in favor of the national denomination, and ruled that a dissident local congregation should retain control of the church property. *See also Arkansas Presbytery of the Cumberland Presbyterian Church v. Hudson*, 344 Ark. 332, 40 S.W.3d 301, *cert. denied*, 534 U.S. 945 (2001); *Korean United Presbyterian Church of Los Angeles v. Presbytery of the Pacific*, 230 Cal. App. 3d 480, 281 Cal. Rptr. 396, *cert. denied*, 502 U.S. 1073 (1991); *Presbytery of Elijah Parish Lovejoy v. Jaeggi*, 682 S.W. 2d 465 (Mo. 1984); *First Presbyterian Church of Schenectady v. United Presbyterian Church in the United States*, 62 N.Y.2d 110, 464 N.E.2d 454 (1984); *York v. First Presbyterian Church*, 130 Ill. App.3d 611, 474 N.E. 2d 716 (1984), *cert. denied*, 474 U.S. 865 (1985); *Jones v. Wolf*, 241 Ga. 388, 260 S.E.2d 84 (1979), cert. denied, 444 U.S. 1080 (1980); *Presbytery of Riverside v. Community Church of Palm Springs*, 89 Cal.App.3d 910, 152 Cal.Rptr. 854, cert. denied, 444 U.S. 974 (1979); *and Trinity Presbyterian Church v. Tankersley*, 374 So.2d 861 (Ala. 1979), cert. denied 445 U.S. 904 (1980).

On the other hand, the Maryland Court of Appeals applied the "neutral principles of law" approach to reach the opposite conclusion: that in the event of a secession of a local parish from the United Presbyterian Church, the property should be awarded to the presbytery. *Presbytery of Baltimore of United Presbyterian Church v. Babcock Memorial Presbyterian Church*, 52 Md. App. 428, 449 A.2d 1190 (1982); *aff'd* 296 Md. 573, 464 A.2d 1008 (1983), *cert. denied*, 465 U.S. 1027 (1984); *see also Calvary Presbyterian*

Church v. Presbytery of Lake Huron, 148 Mich.App. 105, 384 N.W. 2d 92 (1986).

The national Presbyterian church deserves greater clarity from state courts than incoherent determinations that flop one way on the north and the other way on the south of the Mason-Dixon line,[9] and one way on the east shore and the other way on the west shore of Lake Michigan.[10]

B. Episcopal cases. Civil courts should have nothing to say about ecclesiastical decisions concerning fitness for the ministry, such as those now dividing Episcopalians.[11] *See, e.g., McDonnell v. Episcopal Diocese of Georgia*, 191 Ga. App. 174, 381 S.E.2d 126, *cert. denied*, 493 U.S. 935 (1989). But courts must sometimes resolve secular disputes such as ownership of church property after a schism has occurred. Like Presbyterians, Episcopalians can no longer rely on a uniform approach among State courts in the disposition of church property when a local parish decides to leave the national body. As with the Presbyterians cases, the Episcopal church cases are in direct conflict with the lower court in *Pappas* on whether a court may interpret the *constitution* of a hierarchical religious community when they decide a secular claim.

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[9] Compare *Presbytery of Beaver-Butler of United Presbyterian Church v. Middlesex Presbyterian Church*, 507 Pa. 255, 489 A.2d 1317, *cert. denied*, 474 U.S. 887 (1985) (disputed property goes to local congregation leaving the national denomination), with *Babcock Memorial v. Presbytery of Baltimore*, 464 A. 2d 1008 (Md. 1983) (disputed property goes to the national denomination).

[10] *Compare York v. First Presbyterian Church of Anna*, 130 Ill. App.3d 611, 474 N.E. 2d 716 (1984), *cert. denied*, 474 U.S. 865 (1985) (disputed property goes to local congregation leaving the national denomination) *with Calvary Presbyterian Church v. Presbytery of Lake Huron*, 148 Mich. App.105, 384 N.W. 2d 92 (1986) (disputed property goes to the national denomination).

[11] *See, e.g*, Rebecca Trounson, "Episcopal-Anglican rift deepens. U.S. bishops say no to a key demand." *Los Angeles Times* (Mar. 22, 2007).

In *Bjorkman v. Protestant Episcopal Church in the United States of America*, 759 S.W. 2d 583 (Ky. 1988), the Supreme Court of Kentucky affirmed a judgment in favor of a local parish seeking to split off from the Episcopal Church to join the Anglican Catholic Church. This outcome is not the source of conflict with the lower court decision in *Pappas*, which involves no dispute over property. The conflict between the lower court in this case and *Bjorkman* and all of the other cases discussed in this section of the petition is that – ever since this Court's specific direction in *Jones v. Wolf* – many courts have regularly reviewed a church's *constitution* without any thought that doing so was impermissible under the First Amendment. 759 S.W. 2d at 587. *See also Protestant Episcopal Church v. Barker*, 115 Cal. App. 3d 599, 171 Cal. Rptr. 541 (1981), *cert. denied*, 454 U.S. 864 (1981).

Other courts are directly in conflict with the outcome in *Bjorkman*, but not with the methodology of scrutinizing a church's constitution. For example, in *Bennison v. Sharp*, 121 Mich.App. 705, 329 N.W. 2d 466 (1983) the intermediate appellate court in Michigan held on virtually identical facts that the hierarchical form of governance of the Episcopal Church affects the determination not only of spiritual matters, but also of property ownership. Thus both *Bennison* as well as *Bjorkman* are in direct conflict with the lower court in the instant case, because both courts reviewed the church's *articles of incorporation* and canons.

Similarly, the New Jersey Supreme Court also ruled in favor of the Episcopal Church when a local Episcopal parish attempted to sever its ties with the national body. *Protestant Episcopal Church v. Graves*, 83 N.J. 572, 417 A.2d 19, *cert. denied*, 449 U.S. 1131 (1981). The *Graves* court analyzed the facts in terms of deference due to a hierarchically governed community under *Watson v. Jones, supra*. But it also undertook an analysis of "neutral principles of law" which led to the same conclusion. So the lower court in *Pappas* is also in conflict with *Graves*, which not only inspected the deed of property – which ran to the local parish without any language

of an express trust in favor of the Episcopal Church or any reverter clause to the Church – but also evaluated the *constitution* and canons of the Episcopal Church that require Diocesan approval of the sale of a parish church. Indeed, it was on this basis – which the New York court deemed constitutionally impermissible – that the New Jersey court ruled that the Episcopal Church and not the local parish was entitled to the property in dispute. *See also Bishop and Diocese of Colorado v. Mote*, 716 P. 2d 85 (Colo. 1986) (accord, but rejecting *Watson* "deference" and relying exclusively on "neutral principles of law"); *Rector, Wardens, and Vestrymen v. Episcopal Church*, 224 Conn. 797, 620 A. 2d 1280 (1983) (accord; relying on *Watson*); and *Tea v. Protestant Episcopal Church*, 96 Nev. 399, 610 P. 2d 182 (1980) (accord; relying on *Watson*).

The result in *Bjorkman* might have been unthinkable under *Watson v. Jones*, but is now a frequent result after *Jones v. Wolf*. The results in *Bennison, Graves, Mote, Rector*, and *Tea* would have been obvious under *Watson v. Jones*; they have now become clouded and dubious after *Jones v. Wolf*. In the current state of affairs, the Episcopal Church cannot now trust that a uniform national rule will acknowledge that the property of Episcopal churches will remain within the control of the diocese if a dissident parish decides to disaffiliate from the diocese or the national church.

C. Churches with hybrid polities. The bright line drawn by the Court between congregational and hierarchical forms of governance suitably describes many, but by no means all religious communities. For example, Lutheran bishops play a vital role of supervision of the church, but local congregations determine the call of a pastor to their local church. Methodist bishops play a vital role in the assignment of clergy, but a Methodist "annual conference" is not like a Roman Catholic or an Episcopal "diocese." Nothing in this petition should be read to interfere with the freedom of Lutherans to be distinctively Lutheran, or of Methodists to be authentically Methodist. The whole point of the First

Amendment is that civil courts cannot and should not become experts in the niceties of ecclesiology or any other aspect of religious belief and practice. The very fact that neither Lutherans[12] nor Methodists[13] have escaped the ambiguity that now characterizes the jurisprudence of state courts after *Jones v. Wolf* is another reason for the Court to grapple freshly with the problem of church autonomy in a way that moves beyond prior bifurcations and gives to lower courts sounder guidance for the disposition of intra-church disputes.

From 1979 to the present, the Court has not granted plenary review in any case squarely presenting an issue of church autonomy. From reading all of the petitions from OT 1978 to the present, we appreciate that not all of the questions presented to the Court were worthy of review. Many of the petitions between 1979 and 2007 were not drafted with attention to the Court's classic explanation of certworthiness: split of authority among the federal circuit

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[12] *Shepherd of the Valley Lutheran Church v. Hope Lutheran Church*, 626 N.W.2d 436 (Minn. Ct. App. 2001), *cert. denied*, 534 U.S. 1082 (2002); *Singleton v. Christ the Servant Evangelical Lutheran Church*, 541 N.W.2d 606 (Minn. Ct. App.), *cert. denied*, 519 U.S. 870 (1996); *Basich v. Board of Pensions, Evangelical Lutheran Church*, 540 N.W.2d 82 (Minn. Ct. App. 1995), *cert. denied*, 519 U.S. 810 (1996); *Grace Evangelical Lutheran Church v. Lutheran Church-Missouri Synod*, 118 Ill. App. 3d 151, 73 Ill. Dec. 789, 454 N.E.2d 1038 (1st Dist. 1983), *cert. denied*, 469 U.S. 820 (1984).

[13] *California-Nevada Annual Conference of the United Methodist Church v. St. Luke's United Methodist Church* 121 Cal.App.4th 754, 17 Cal.Rptr.3d 442 (2004); *Kliebenstein v. Iowa Conference of the United Methodist Church*, 663 N.W.2d 404 (Iowa), *cert. denied*, 540 U.S. 977 (2003); *East Lake Methodist Episcopal Church, Inc. v. Trustees of the Peninsula-Delaware Annual Conference of the United Methodist Church, Inc.*, 731 A.2d 798 (Del. 1999), *cert. denied*, 528 U.S. 1138 (2000); *New York Annual Conference of United Methodist Church v. Fisher*, 182 Conn. 272, 438 A.2d 62 (1980); *see also Shirley v. Christian Episcopal Methodist Church*, 748 So. 2d 672 (Miss. 1999), *cert. denied*, 531 U.S. 821 (2000).

courts or among state appellate courts on the same federal question. *See* Rule 10, Rules of the Supreme Court.

Many of the petitions, however, disclose questions of great moment not only to the particular communities affected by judicial imposition of meaning and value upon their religious faith and practice, but also a pattern of constitutional error going unchecked by this Court. The incoherence of state court dispositions of intra-church disputes has now become a serious burden on the free exercise of religion because churches cannot protect their own property from arbitrary disposition by courts. The Court should grant the petition to clarify the standards governing judicial disposition of intra-church disputes over secular matters such as contracts and property.

4. The decision of the lower court departs from this Court's broad command against jurisdiction of civil courts over religious aspects – doctrinal or disciplinary – of disputes arising within a religious community, no matter how that community is governed, hierarchically or congregationally, and this Court's constant teaching that in intra-church disputes all persons – irrespective of their religious beliefs and practices – deserve to be protected in the evenhanded enjoyment of their civil rights of contract, tort, and property.

The lower court in this case departed from the clear teaching of the Court on church autonomy in two ways, by making an unnecessary and erroneous theological judgment that was beyond its competence and jurisdiction, and by refusing to grant evenhanded enforcement of contract rights similar to those enjoyed by members of congregationally governed religious communities (such as Jews, Baptists, and Muslims) or by members of secular not-for-profit corporations (such as New York University or the Metropolitan Museum of Art).

A. <u>The duty to refrain from adjudicating theological claims</u>. In the single paragraph setting forth its First Amendment

analysis, the lower court correctly noted that the church to which all of the petitioners faithfully adhere is a hierarchical church: "On the basis of the very charter on which plaintiffs rely, they cannot successfully dispute that the Greek Orthodox Church is hierarchical." App. 3a. We have never disputed the fact that the church is hierarchical, which has not ever been at issue.[14] It is the lower court's sweeping and constitutionally impermissible inference from this fact that necessitates this petition.

The lower court began the crucial sentence at issue in this petition as follows: "it may at first appear that neutral principles of law can be applied to decide whether defendant's 1977 charter was properly amended pursuant to article XXIV thereof...." App. 3a. This part of the sentence makes sense for three reasons. First, a plain reading of the terms of Article XXIV leads to the conclusion that it is a straightforward procedural mechanism that directs that the Charter may not be amended unilaterally. Second, one of the most basic "settled expectations" of contracts is that they may not be altered unilaterally by one party; for example, neither a seller nor a buyer may alter crucial terms of a commercial contract without express language authorizing such changes. Third, the lower court's acceptance of the utility of the "neutral principles of law" approach recommended by this Court in *Jones v. Wolf*, is, in fact grounded in decisions of the New York Court of Appeals adopting this approach both in disputes over the meaning of a

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[14] Neither are any *canonical matters* at issue in this case. Petitioners, moreover, have never objected to the renaming of various ecclesiastical positions, changing of diocesan boundaries, rules about monasteries, or other matters of a purely ecclesiastical character. The only issue here is whether the Archdiocese may proceed with a new Charter about such matters without the requisite deliberative process of the CLC and without compliance with New York corporation law to which the church is subject, such as standard elements of due process, including adequate notice to the delegates of the CLC.

religious contract in a *congregationally* governed community, *Avitzur v. Avitzur*, 58 N.Y.2d 108,115 (1983) (enforcing promise in Jewish *ketubah* or wedding contract) and in intra-church disputes over *property* in a *hierarchical church*, *First Presbyterian Church of Schenectady v. United Presbyterian Church in the United States*, 62 N.Y.2d 110, 464 N.E.2d 454 (1984).

Curiously, however, the lower court concluded: "if this case were to proceed further, a trial court would ultimately be required to decide whether the Ecumenical Patriarch had authority unilaterally to grant a charter to defendant in 2003 – clearly, a religious matter." App. 3a. There are several reasons why this conclusion is erroneous. First, it is a speculative guess about future behavior of the CLC that has no basis whatever in the record. For all we know, the CLC might readily reach accord on the purported 2003 Charter if it were properly submitted to it for open discussion and deliberation in compliance with the promise of Article XXIV and applicable New York state law governing religious corporations. Second, it completely overlooks the fact that the CLC has no jurisdiction whatever over doctrinal or canonical matters of the church. *See* Art. XI of 1977 Charter, App. 20a. Third, it overlooks the fact that the Archdiocese and the Patriarchate knowingly and voluntarily agreed to be bound by the procedure for charter amendment they accepted in Article XXIV. Fourth, the lower court compounded its constitutional error that courts may not interpret the constitution of a religious corporation by grounding this erroneous conclusion on a *theological* claim at variance with the history and traditions of Eastern Orthodoxy. Whether the Ecumenical Patriarchate has legitimate authority to do what the lower court imagines it may do – without complying with state law or its own contractual promise in Article XXIV – is indeed a "religious matter." For this very reason the lower court had no business entering into the theological thicket and making such a naïve and provocative

theological judgment that the hierarchical nature of a church excuses it from its contractual or corporate obligations.[15]

We noted above that the *Bjorkman* court is in conflict with the lower court in *Pappas* over the methodology of inspecting a religious corporation's constitution. Lamentably, there is a dimension in which *Bjorkman* and *Pappas* are in harmony: both courts indulged in impermissible theological pronouncements beyond their ken and competence. The *Bjorkman* court opined that the relationship of the national church to the parish was "exclusively ecclesiastical" and that the local parish "was at all times in control of its temporal

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[15] In effect, the lower court created a broad judicial exemption with no statutory basis. This judge-made exemption from generally applicable obligations of religious corporations in RCL §15 proves too much for two reasons. First, the statute refers to "annual conferences" (Methodists), "presbyteries" and "synods" (Presbyterians) and to Episcopalians, Lutherans, and other Orthodox Christians, App. 17a-20a, none of whom in the logic of the lower court would have to comply with the statute. This creates a serious problem of discrimination among religions. Second, the lower court adopted a naïve misunderstanding of the term "hierarchical." This term embraces many very different forms of church polity or governance, and includes a variety of ways of defining the functions played by the clergy and the laity within these "hierarchical" communities. Many religious communities are in some sense "hierarchical" or at least have a hybrid form of governance including both hierarchical and congregational aspects. But that does not mean that these churches have identical forms of governance. For example, the beliefs and practices of church governance of the Greek Orthodox are not the same as those of Roman Catholics, Episcopalians, Methodists, Presbyterians, or Lutherans, all of whom are in some sense "hierarchical," and all of whom retain important, distinctive roles for the clergy and the laity in their churches. Civil courts do not have a roving mandate to diminish these roles by judicial fiat. This Court should correct all such deviations by clarifying that it is not the business of civil courts to make theological judgments on the polity or mode of governance of any religious community, whether "hierarchical" "or congregational." All that civil courts need to do is to stick to what the Constitution permits and requires: evenhanded treatment of all claimants of a breach of contract on secular aspects of contract law voluntarily entered into by religious communities.

affairs." 759 S.W. 2d at 587. This bifurcation of the relationship between the Episcopal Church and one of its parishes into matters temporal and matters spiritual badly misstates Episcopal ecclesiology. This misunderstanding of Episcopal polity is akin to the *Pappas* court's amateurish pronouncement on "patriarchal authority"[16] Misunderstandings of this magnitude should not be overlooked, for judges in our Republic are not supposed to be gifted at theology. *Thomas v. Review Bd. of Indiana Employment Security Division*, 450 U.S. 707, 716 (1981) ("Courts are not arbiters of scriptural interpretation."). Judges are forbidden to makes forays into theology for a similar reason that prohibits schools boards from writing prayers, *Engel v. Vitale*, 370 U.S. 421 (1962): both will bungle a task that they have no business attempting. The Court should grant the petition to remind lower courts that problems of interpretation are exacerbated when outsiders view facts with blinders on. *See Corporation of Presiding Bishop v. Amos*, 487 U.S. 327 (1987).

This Court does not sit to correct myriad errors of appellate procedure (such as going beyond the record) or even

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[16] The trial court also accepted the invitation of the respondent's lawyers to enter the theological thicket, making an egregiously erroneous pronouncement that "all of [the other Orthodox churches] are essentially governed by the Ecumenical Patriarchate." App. 7a. This egregious factual misstatement is deeply offensive to the many autocephalous Orthodox churches that are emphatically *not* "essentially governed by the Ecumenical Patriarchate" of Constantinople. This illustrates one reason why such errors are of constitutional magnitude. It is no less improper for the appellate court to have speculated that the Patriarch has "authority unilaterally to grant a charter," App. 3a, without hearing from the CLC in the manner mutually agreed upon in Article XXIV. If the assertion of both lower courts about the power of the Ecumenical Patriarchate were correct, moreover, the legislature and courts of New York could have finessed a different way of wresting St. Nicholas's Cathedral in Manhattan from the Patriarch of Moscow, and this Court's labors on this matter would have turned out profoundly differently than the way they did. *See Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952), and *Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190 (1960).

of illogical reasoning. But when a court grounds a legal conclusion on a theological view, it commits a grave constitutional error that this Court can and should correct. No civil court in this country is constitutionally permitted to engage in the sort of theological interpretation indulged in by the lower court. *Thomas v. Review Bd. of Indiana Employment Security Division*, 450 U.S. 707, 716 (1981) (unemployment compensation claim of religious claimant must be resolved by civil courts without engaging in impermissible judicial interpretation of religious or theological claims). This Court should grant the Petition to reassert that lower courts "are not arbiters of scriptural interpretation." *Thomas, supra, id.*

B. The duty to enforce contract obligations evenhandedly. From *Watson v. Jones,* 80 U.S. (13 Wallace) 679 (1872) to *Jones v. Wolf*, 443 U.S. 595 (1979), this Court has clarified two central teachings that are basic to our understanding of religious freedom in our society. First, all members of our society – irrespective of their religious beliefs and practices – deserve to be protected in the enjoyment of their civil rights of contract, tort, and property; these rights are neither enhanced by membership in a religious community nor diminished by nonmembership in such a community. Second, civil courts have no jurisdiction over religious aspects – whether doctrinal or disciplinary – of disputes arising within a religious community, no matter how that community is governed, hierarchically or congregationally.

Neither of these constitutional truths is dispensable. Both are necessary. The only permissible way to maintain the delicate balance needed to preserve both of these values is to insure that civil courts confine their power exclusively to secular dimensions of a conflict, whether it arises within a religious community, or a secular not-for-profit organization, or in a for-profit commercial company. The law of contract, tort, and property embody societal values enjoyed by all and do not admit of discrimination on the basis of religion. *See*

Larson v. Valente, 456 U.S. 228 (1982) ("one religious denomination cannot be officially preferred over another").

The earliest cases decided by this Court involving intra-church disputes over contracts involved legal claims for a share in the financial resources of utopian religious communities whose members were committed to holding property and all other assets in common. *See Goesele v. Bimeler*, 55 U.S. (14 Howard) 589 (1853), *Baker v. Nachtrieb*, 60 U.S. (19 Howard) 126 (1856), and *Speidel v. Henrici*, 120 U.S. 377 (1887). In these cases the Court repeatedly applied principles of contract law to resolve the secular claim of disaffected former members of these groups, without intruding upon the religious aspects of the controversy.

In *Watson v. Jones*, Justice Miller acknowledged that "When a civil right depends upon an ecclesiastical matter, it is the civil court and not the ecclesiastical which is to decide. But the civil tribunal tries the civil right, and no more, taking the ecclesiastical decisions out of which the civil right arises, as it finds them." 80 U.S., at 731. In order to keep the civil courts from straying beyond their mandate into the forbidden territory of adjudicating religious claims, Justice Miller also wrote in *Watson* that civil courts exercise no jurisdiction over a "subject matter of dispute" which is "strictly and purely ecclesiastical in its character ... a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standards of morality required of them." *Id.* at 733. As noted above, this case does not concern any of these matters.

The lower court turned the interpretation of Article XXIV of the 1977 Charter – a procedural provision about the manner of going about charter amendment – into a "religious matter." Judges are trained to do exactly what petitioners seek in this lawsuit: read a straightforward procedural provision in a contract and statutory requirements of corporation law and say what these provisions mean. They

lack both expertise and jurisdiction to do what the respondent invited them to do: wander into the theological thicket and base their decision on the theological claim of the Archdiocese about the power of the Ecumenical Patriarchate to alter the contract unilaterally, that is, without statutorily required notice to the CLC and without open deliberation on the proposed changes of the corporate constitution (the 1977 Charter) by the CLC.

The effect of the lower court's dismissal of petitioners' claim of breach of contract and noncompliance with state corporation law is to deprive petitioners and all similarly situated persons in incorporated religious organizations of their civil right to evenhanded enforcement of contractual obligations. In a word, it is discriminatory. The Court should grant the petition to bring its jurisprudence on nondiscrimination into play in the resolution of intra-church disputes.

The logic of the lower court's decision is that *Milivojevich* requires dismissal of virtually all cases brought against a hierarchical church. This way of thinking ignores the way in which the value of nondiscrimination has come to play in free exercise cases, *see, e.g.*, *Employment Div. of Oregon v. Smith*, 494 U.S. 872 (1990) (no special immunity for religion in the circumstances of a *generally applicable* norm of criminal conduct) and nonestablishment cases, *see, e.g., Agostini v. Felton,* 521 U.S. 203, 231 (1997) (financial incentive for parents to choose a sectarian school not present where "aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a *nondiscriminatory* basis").

The Court should grant the petition because the lower court's opinion cannot be squared with this Court's nuanced view in its church autonomy cases that sustain two cardinal values. On the one hand, this Court's repudiation of civil court jurisdiction over doctrinal disputes or imposition of canonical discipline (e.g., removal of clergy or

excommunication of a member) is the core of its cases from *Watson* to *Milivojevich*. This teaching is well grounded in First Amendment values, and the Court should clarify that this is not limited to hierarchical communities, but extends to any religious community, no matter how they are governed.

On the other hand, ever since this Court began addressing the issue of church autonomy, it has also taught that civil courts must retain jurisdiction to enforce commonly held and generally applicable legal norms governing contracts, torts, and property. Evenhanded enforcement of these secular aspects of life is the only way that a legal system of contracts, torts, and property can survive. The rights of members of hierarchically governed communities in these matters are neither greater nor lesser than those enjoyed by members of congregationally governed communities, or for that matter, by nonbelievers. The Court should grant the petition to clarify this fundamental aspect of its teaching.

Milivojevich and *Jones v. Wolf* are not in irreconcilable tension with one another, *see Milivojevich*, 426 U.S., at 723 n. 15, and *Jones v. Wolf*, 443 U.S. at 602, but the cases in the state courts applying these precedents to intra-church disputes are now in disarray. By granting the petition, the Court can give to the state courts much-needed guidance on whether and how to resolve intra-church disputes: (1) by applying the nondiscrimination principle, and (2) by limiting their jurisdiction to dimensions of these disputes that do not involve religious or theological or canonical interpretation, and that can be resolved on the basis of legal principles – such as enforceability of promises in a religious contract, see *Avitzur v. Avitzur*, 58 N.Y.2d 108 (1983) – that have general applicability to all contract disputes. Because this case involves a tight focus on the meaning of Article XXIV of the 1977 Charter as an enforceable promise to follow mutually agreed upon process, and on generally applicable statutes on corporate governance, it is an excellent vehicle for clarifying what *Milivojevich* has in common with *Jones v. Wolf*.

Conclusion

For these reasons, petitioners request that the Court grant the petition.

Respectfully submitted,

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